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Co-Chairs and Members,
Expert Panel On Constitutional Recognition Of Indigenous Australians

Dear Panel Members,

I agree with the general thrust of the remarks that I heard at the Brisbane consultation session – that while recognition in a preamble is a good start, it is not enough. At the same time I acknowledge, as self-evident truth, the point you make as the 3rd dot point on p 16 of the Issues Paper, that any proposal ‘must be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums’. I therefore make the following suggestions:

1. A new preamble, acknowledging the wrongs done to the indigenous people, *and* taking possession of the Constitution as something authorised by the People of Australia

After all the waffle that I have heard about inserting a statement of recognition ‘into the preamble’, I was greatly relieved to read the remark in the Issues Paper that ‘the Constitution does not have a preamble into which a Statement of Recognition could simply be inserted’. All the Constitution has at the moment is a preamble to the United Kingdom Act of which it is a mere ‘section’, and the so-called ‘covering clauses’. Nowhere is there a statement that says anything like the American words of enactment” ‘We the people ... ordain and establish this Constitution’. I imagine that this is part of the reason why your opinion poll on whether the Constitution adequately reflects who we are as a nation today is running at 90% ‘No’.

So, panellists, we have an opportunity to do two things at once – take control of the Constitution as something enacted by the people (its text was endorsed by the people of the colonies, including some women and some indigenous people in the 1890s, after all), *and* acknowledge that the foundation of British Australia was done by taking control of a continent away from its first people, who were then marginalised for much of its history. At the same time, I don’t suggest something that reeks *too much* of ‘black armbands’ or sackcloth and ashes – we received some valued political and legal principles from the British (even if we then had to improve on them with innovations like the secret ballot) and we should acknowledge that too.

So what I suggest is the following – 2 recital-of-history clauses, 2 declarations of purpose, and some words of enactment, or at least of confirmation, that include the provisions of the present ‘covering clause’ 5. This should be inserted before ‘This Constitution is divided as follows’, instead of the present heading ‘THE CONSTITUTION’, in the present text:

The Constitution of the Commonwealth of Australia

We the People of Australia

Recognise that we received many valued principles of government, including parliamentary democracy and the rule of law, from the colonisation of Australia by the United Kingdom,

But acknowledge that the process of colonisation occurred in total disregard of the rights of the people already indigenous to Australia, and that for many years their descendants' rights to equal citizenship and title to their land were not recognised.

Therefore we now –

Declare that we acknowledge and honour the indigenous people as the descendants of Australia's first people, and celebrate their contributions to national life and culture as we also celebrate the contributions made by successive waves of migrants, from the early colonists to those most recently arrived,

Commit ourselves to living under a democratic system in which all citizens have equal political rights, regardless of their ancestry, and all our differences are resolved peacefully, fairly, and with mutual respect, and

Declare that this Constitution continues to have force as the supreme law of the land, that the powers of all parliaments in Australia are subject to this Constitution, and that this Constitution and all laws made by the Parliament of the Commonwealth under it are binding on the courts, judges, legislatures, executive governments and people within Australia and in all places where Australian law applies.

I have deliberately kept this short and relatively low-key. I don't want to scare those who fear that new things in a preamble might be used by an 'activist' High Court to change the meaning of the text; if we want to change the text let us do that by express amendment (see **2** below). I have not used the word 'invasion' though some might think 'colonisation occurred in total disregard' comes close – I think the majority of Australians are now prepared to accept that. I have not referred to indigenous 'sovereignty' as some activists would like, but as you will see below I think the Commonwealth government should be given the power to negotiate with indigenous groups to grant them at least a greater degree of autonomy. You will notice that I have limited the declaration of equality to equal *political* rights – I do not want to scare off conservatives by including some broader declaration of equality that they might see as authorising a general 'levelling down'. Likewise, I have not limited the 'celebration of contribution' clause to the indigenous people, as the recent State preambles have been tending to do. Though I acknowledge below that there should be scope for special laws to remedy the specific wrongs done to the first peoples, I think it is more appropriate for a preamble to celebrate diversity rather than focussing *too much* on one group.

On the other hand I *have* included references to a couple of the things that scared the strangely-timorous Constitutional Commission in the 1980s – democracy and the rule of law. The High Court has been quite able to imply those principles from the *text* of the Constitution (*Roach v Electoral Commissioner*, *Rowe v Electoral Commissioner*; Dixon J in the *Communist Party case*, *A v Hayden*) so a reference in the preamble will add nothing. And I have gone way beyond the feeble statement suggested by John Howard and Les Murray that ‘we commit ourselves to this Constitution’. We *do* commit ourselves, in my draft, to a non-discriminatory democracy, and to settling our differences ‘peacefully, fairly, and with mutual respect’. In including that phrase I mean it to apply not only to differences between racial groups, but to differences between social classes and between individuals. After seeing the recent British riots on TV, I believe a statement like should be incorporated in the Constitution and taught in our schools. But as to the relationship between ourselves, our government, and the Constitution, we declare that we commit *our politicians* to being subjected to it by the exercise of our will. I believe that the people of Australia are ready to declare their sovereignty over their own constitution, while at the same time acknowledging the injustices involved in the foundation of the modern nation.

2. Amendment of the text of the Constitution

(a) Repeal of the current race power

Having suggested a preamble that does no more than recognise past injustice and commit ourselves to mutual respect and political equality in the future, I recognise that, of all the 200+ races in Australia, the indigenous people have a claim to special treatment in the law. I suspect that within 20 years we will find the majority of the High Court agreeing with Gaudron J’s view that a law can only be ‘deemed necessary’ under the race power when it is appropriate and adapted to a real difference in the situation of the affected race. However, there is something fundamentally offensive about the power in its current broad form and it should be repealed – but some extra powers should be added to replace it.

(b) The recognition of indigenous title to land

If the race power in its current form were to be repealed, the constitutional basis of the *Native Title Act 1993* might become doubtful (this seems to be overlooked in your issues paper). Therefore the thing that should be proposed as a replacement for the current race power is a power to make laws with respect to the recognition of indigenous title to land. Including the word ‘recognition’ should make it clear that the power is not intended to authorise the extension of native title to areas where it has been extinguished. In case that is not enough, ‘in accordance with the doctrine in *Mabo v Queensland*’ could be added.

(c) The prohibition of racial discrimination

While I would be happy for the Constitution to include a clause directly prohibiting racial discrimination, I urge caution on this one. Any suggestion that rights should be stated directly in the Constitution will bring out the parliamentary supremacists with their vociferous whinging about ‘handing power over to the unelected judiciary’. Instead I would suggest that the Commonwealth should have a power to make laws with respect to ‘the prohibition of racial

discrimination’ – par (xxviA). As we all know, they already have this power because there is an international treaty, but proposing a specific power would allow the Australian people to directly endorse the Parliament’s decision to enact the *Racial Discrimination Act*. I believe the majority would do so. I would hope that in time the people, having taking ownership of the constitution by adopting the preamble, will become more attuned to the idea that their constitution can be used to guarantee human rights – and that that is giving power to the people, not to the judiciary – but let us take one step at a time.

(d) Laws with respect to culture, historical disadvantage and unique place

I would vote for this – which I guess would be par (xxviB) – myself. At this point in the list, however, I start to wonder whether this and the following suggestions would receive majority support – first, the States have not yet totally surrendered to the idea that the Commonwealth can do things better, and secondly the Hansonite whine that ‘equality is all very well but these people are getting special treatment’ is still being heard. While exposure to a bit of history about the reality of dispossession and disadvantage should reassure everyone that this power is necessary, I suggest that it should be put as a separate referendum question so that the preamble and the two above powers should not be sabotaged by being associated with the more controversial one.

(d) Recognition of indigenous law

Another power that I believe the Commonwealth should have is to make laws for the recognition of indigenous laws, where not inconsistent with fundamental human rights as listed in, for example, the ICCPR. However, this is one that probably should be left for a later referendum – after people have got used to the fact that the sky did not fall with the passage of the proposals discussed above.

(e) An agreement-making power

I find the agreement-making power as discussed in the Issues Paper a bit vague – would the agreements be made with nationally representative bodies or with native title land trusts or other management groups? If the latter, I suggest that there is a lot to be said for this. We could go at least part-way to meeting the demand by some indigenous spokespersons for sovereignty, by adding, after the power to make laws with respect to the recognition of indigenous title to land (2(b) above), the words ‘and agreements as to the governance of areas held under indigenous title’. However, I would *not* recommend proposing this in the current state of general ignorance about the issues. A *long* campaign of education about how the (at least partial) autonomy of the Inuit, the Native Americans and the Maori is recognised in Canada, the US and New Zealand would be necessary before I would expect a majority of the people would approve of such an addition to the Commonwealth’s list of powers. If you wanted to recommend its addition to the text in the same referendum as the preamble and the above changes to Commonwealth power, I would certainly recommend that it should be posed as a separate question.

(f) Section 25

For the old Constitutional Commission to describe s 25 as ‘odious’ simply demonstrates how much difficulty some people – even some with law degrees – have in reading legal provisions in context. It is actually derived from section 2 of the 14th Amendment to the US Constitution, which is designed to *punish* States for restricting their franchise on a racial basis, and to give them an incentive to repeal any such restrictions. At the same time, it is hard to argue that it is doing a lot of good in the Commonwealth Constitution in 2011. To my knowledge, no State has racial restrictions on its franchise these days and if one did it would be contrary to the *Racial Discrimination Act*. So since the section is doing no work and causes so much misunderstanding, it might as well be proposed for removal. In an ideal world, we would replace it with an express guarantee of the right of all citizens to vote in Commonwealth *and* State elections (and a baseline definition of citizenship), but *Roach* and *Rowe* now guarantee the right to vote for Commonwealth elections, the State franchises are generally fair (with oddities in the composition of upper houses, but not on a racial basis), and the States would probably whinge about Commonwealth interference in their affairs. So by all means recommend its removal – but *please* let us not have too many misstatements of its effect in the course of a “yes” campaign.

I am happy to talk further to the Panel or your staff at any time about my submission, or in general about your project. I most certainly do *not* want any of this submission to be kept confidential.

Sincerely

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